No. ~~1080~~ 59

In the Supreme Court of the United States

OCTOBER TERM, 1941

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL., APPELLANTS

v.

ROSCOE C. FILBURN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of Ohio, Western Division

CIVIL NO. 118

ROSCOE C. FILBURN, PLAINTIFF

v.

CARL R. HELKE ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

(Filed March 25, 1942)

In compliance with Rule 12 of the Supreme Court of the United States as amended, Claude R. Wickard, Secretary of Agriculture, Carl R. Helke, Roy M. Baker, and Homer W. Flinsbach, individually and as members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and Dale Williams, individually and as a member of the State Agricultural Conservation Committee for the State of Ohio, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court, entered in this cause on March 25, 1942. A petition for appeal was filed on March

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25, 1942, and is presented to the District Court herewith, to wit, on the 25th day of March 1942.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 3 of the Act of August 24, 1937, 50 Stat. 752 (28 U. S. C. sec. 380 (a)).

The decision in *Mulford* v. *Smith*, 307 U. S. 38, sustains the direct appellate jurisdiction of the Supreme Court to review the judgment in this cause on the ground that a district court convened pursuant to the provisions of Section 3 of the Act of August 24, 1937, 50 Stat. 752, has granted an injunction against the enforcement of an act of Congress for the reason that the enforcement of said act would violate the Constitution of the United States.

STATUTE INVOLVED

The statute of the United States the provisions of which were held unconstitutional is the Act of February 16, 1938, Public, No. 430, 75th Congress, 52 Stat. 31, as amended (7 U. S. C., Sec. 1281, *et seq.*), as further amended by the Act of May 26, 1941, Public, No. 74, 77th Congress (55 Stat. 203), and as amended by the Act of December 26, 1941, Public, No. 384, 77th Congress (55 Stat. 872). The pertinent provisions are set forth in an appendix attached hereto.

THE ISSUES

The plaintiff-appellee filed this suit on July 14, 1941, to enjoin the collection of penalties provided for in the Act of May 26, 1941, amending the Agricultural Adjustment Act of 1938. The plaintiff-appellee is a wheat producer who, prior to the enactment of the amendment, had planted wheat in excess of the acreage allotment fixed for him by the Secretary of Agriculture pursuant to the provisions of the Agricultural Adjustment Act of 1938. The complaint alleged that the increased penalties were about to be applied to an amount of the wheat produced by plaintiff-appellee which was available for marketing in excess of his quota. It was charged not only that the statute as amended is unconstitutional but that the provisions of the amendment increasing the penalties would deprive the plaintiff-appellee of due process of law if applied to the wheat which he had under cultivation at the time the amendment was enacted and became effective. By stipulation between the parties, it was agreed that the issues presented were as follows:

1. Whether the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938 as amended constitute a valid exercise of the power of the Congress to regulate interstate and foreign commerce.

2. Whether the wheat marketing penalty prescribed by the said act may be made applicable, as

provided by the Congress in the act, to the plaintiff's farm marketing excess of wheat which is available for marketing but which has not actually been disposed of by the plaintiff.

3. Whether the wheat marketing quota provisions of the act, as applied to the plaintiff's 1941 crop of wheat which was planted and practically ready for harvest before farm wheat marketing quotas became effective under the said act, are consistent with due process of law.

4. Whether the increase under an amendment to the said act in the rate of the marketing penalty from 15 cents a bushel to 49 cents a bushel after the plaintiff's 1941 crop of wheat was planted and practically ready for harvest is consistent with due process of law.

THE RULING OF THE DISTRICT COURT

The specially constituted District Court granted an injunction against enforcement of the statutory penalty. Circuit Judge Florence E. Allen dissented from the ruling and filed an opinion sustaining the validity of the statute on each issue raised.

The majority of the court did not pass upon the validity of the statute as a regulation of commerce, nor did it decide whether the statute might validly be applied to wheat which had not been disposed of by the plaintiff-appellee. They held, however, that the increased penalties were invalid

as applied to wheat under cultivation at the time the increased penalties were enacted and became effective. The opinion clearly indicates that the Government could enforce the much smaller penalties which were in effect at the time plaintiff-appellee's wheat was planted.

The majority of the District Court distinguished the decision in *Mulford* v. *Smith*, 307 U. S. 38, apparently on the primary ground that there was some irregularity in the referendum of wheat producers which was conducted, pursuant to the provisions of the statute, as a condition precedent to the amendments becoming effective. That referendum was conducted on May 31, 1941. On May 19, 1941, the Secretary of Agriculture made a radio speech to wheat farmers discussing the importance of putting into effect the forthcoming amendment of May 26, 1941, to the wheat marketing provisions of the Agricultural Adjustment Act. The majority of the District Court found that the Secretary had misled the producers by failing to refer to the proposed increase in the penalties for marketing wheat in excess of the quota allotments.

THE QUESTIONS ARE SUBSTANTIAL

The questions involved are substantial and of great public importance. The decision of the District Court invalidates the Act of May 26, 1941, in its application to the 1941 wheat crop. If the

decision is followed by other courts the result will be that the Government can collect, at most, penalties amounting to only a fraction of the penalties provided by Congress for failure to abide by quota allotments in the production of wheat.

We believe that the ruling of the majority of the District Court is contrary to the ruling of the Supreme Court in *Mulford* v. *Smith*, 307 U. S. 38. There the Court sustained provisions of the Agricultural Adjustment Act of 1938 which established penalties for marketing flue-cured tobacco in excess of marketing quotas. The penalties there involved were not merely increased but were enacted for the first time after the tobacco was in the course of being prepared for market. However, the Supreme Court held that the penalties were not retroactive because they applied to "marketing" and the penalties were enacted prior to the "marketing" of the tobacco.

Aside from the merits of the contention, the alleged misleading statements by the Secretary of Agriculture afford no basis for invalidating the referendum by which the new program established by the Act of May 26, 1941, became effective. A similar attack upon a referendum conducted by the Secretary of Agriculture under the Agricultural Adjustment Act was rejected by the Supreme Court in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533.

There are at present numerous cases pending in district courts which involve the validity of the

statute considered in this case. An authoritative decision will dispose of many of those cases and will settle important questions as to the applicability of the Agricultural Adjustment Act as amended to wheat crops for years subsequent to 1941.

Respectfully submitted.

(Signed) CHARLES FAHY,
Solicitor General.

APPENDIX TO JURISDICTIONAL STATEMENT

COMPILATION OF PERTINENT WHEAT MARKETING QUOTA PROVISIONS OF AGRICULTURAL ADJUSTMENT ACT OF 1938, AS AMENDED

Prefatory Note

Throughout this compilation italics is used to indicate amendments to the original text.

* * * * *

Citations are contained in parentheses at the end of the section or subsection concerned. Note references appearing in any section or subsection refer to explanatory matter at the end of such section or subsection.

Whenever a change has been made having the effect of an amendment but not specifically designated as an amendment, the new material, or a citation thereto, is included in brackets immediately after the title, section, or subsection affected.

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PART II—AGRICULTURAL ADJUSTMENT ACT OF 1938, AS AMENDED

AN ACT

To provide for the conservation of national soil resources and to provide an adequate and balanced flow of agricultural commodities in interstate and foreign commerce and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in

Congress assembled, That this Act may be cited as the "Agricultural Adjustment Act of 1938". (7 U. S. C. 1940 ed. 1281, February 16, 1938, 52 Stat. 31.)

Declaration of Policy

SEC. 2. It is hereby declared to be the policy of Congress to continue the Soil Conservation and Domestic Allotment Act, as amended, for the purpose of conserving national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch land resources in the national public interest; to accomplish these purposes through the encouragement of soil-building and soil-conserving crops and practices; to assist in the marketing of agricultural commodities for domestic consumption and for export; and to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices. (7 U. S. C. 1940 ed. 1282, February 16, 1938, 52 Stat. 31.)

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TITLE III—LOANS, PARITY PAYMENTS, CONSUMER SAFEGUARDS, AND MARKETING QUOTAS

SUBTITLE A—DEFINITIONS, LOANS, PARITY PAYMENTS, AND CONSUMER SAFEGUARDS

Definitions

SEC. 301. (a) *General definitions.*—For the purposes of this title and the declaration of policy—

* * * * *

(3) The term "interstate and foreign commerce" means sale, marketing, trade, and traffic between any State or Territory or the District of Columbia or Puerto Rico, and any place outside thereof; or between points within the same State or Territory or within the District of Columbia or Puerto Rico, through any place outside thereof; or within any Territory or within the District of Columbia or Puerto Rico.

(4) The term "affect interstate and foreign commerce" means, among other things, in such commerce, or to burden or obstruct such commerce or the free and orderly flow thereof; or to create or tend to create a surplus of any agricultural commodity which burdens or obstructs such commerce or the free and orderly flow thereof.

* * * * *

(b) *Definitions applicable to one or more commodities.*—For the purposes of this title—

* * * * *

(6) (A) "Market", in the case of corn, cotton, rice, tobacco, and wheat, means to dispose of, in raw or processed form, by voluntary or involuntary sale, barter, or exchange, or by gift inter

vivos, and, in the case of corn and wheat, by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of, but does not include disposing of any of such commodities as premium to the Federal Crop Insurance Corporation under title V.

(B) "Marketed", "marketing", and "for market" shall have corresponding meanings to the term "market" in the connection in which they are used.[b] [1]

SUBTITLE B

PART III.—MARKETING QUOTAS—WHEAT

Legislative Findings

SEC. 331. Wheat is a basic source of food for the Nation, is produced throughout the United States by more than a million farmers, is sold on the

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[1] Matter from [b] to [b] substituted July 2, 1940, by 54 Stat. 727, in lieu of the following: "(6) (A) 'Market', in the case of cotton, wheat, and tobacco, means to dispose of by sale, barter, or exchange, but in the case of wheat, does not include disposing of wheat as premium to the Federal Crop Insurance Corporation under Title V.

"(B) 'Market', in the case of corn, means to dispose of by sale, barter, or exchange, or by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of.

"(C) 'Market', in the case of rice, means to dispose of by sale, barter, or exchange of rice used or to be used for human consumption.

"(D) 'Marketed', 'marketing', and 'for market' shall have corresponding meanings to the term 'market' in the connection in which they are used."

* * * * * *

country-wide market and, as wheat or flour, flows almost entirely through instrumentalities of interstate and foreign commerce from producers to consumers.

Abnormally excessive and abnormally deficient supplies of wheat on the country-wide market acutely and directly affect, burden, and obstruct interstate and foreign commerce. Abnormally excessive supplies overtax the facilities of interstate and foreign transportation, congest terminal markets and milling centers in the flow of wheat from producers to consumers, depress the price of wheat in interstate and foreign commerce, and otherwise disrupt the orderly marketing of such commodity in such commerce. Abnormally deficient supplies result in an inadequate flow of wheat and its products in interstate and foreign commerce with consequent injurious effects to the instrumentalities of such commerce and with excessive increases in the prices of wheat and its products in interstate and foreign commerce.

It is in the interest of the general welfare that interstate and foreign commerce in wheat and its products be protected from such burdensome surpluses and distressing shortages, and that a supply of wheat be maintained which is adequate to meet domestic consumption and export requirements in years of drought, flood, and other adverse conditions as well as in years of plenty, and that the soil resources of the Nation be not wasted in the production of such burdensome surpluses. Such surpluses result in disastrously low prices of wheat and other grains to wheat producers, destroy the purchasing power of grain producers for indus-

trial products, and reduce the value of the agricultural assets supporting the national credit structure. Such shortages of wheat result in unreasonably high prices of flour and bread to consumers and loss of market outlets by wheat producers.

The conditions affecting the production and marketing of wheat are such that, without Federal assistance, farmers, individually or in cooperation, cannot effectively prevent the recurrence of such surpluses and shortages and the burdens on interstate and foreign commerce resulting therefrom, maintain normal supplies of wheat, or provide for the orderly marketing thereof in interstate and foreign commerce.

The provisions of this Part affording a cooperative plan to wheat producers are necessary in order to minimize recurring surpluses and shortages of wheat in interstate and foreign commerce, to provide for the maintenance of adequate reserve supplies thereof, and to provide for an adequate flow of wheat and its products in interstate and foreign commerce. The provisions hereof for regulation of marketings by producers of wheat whenever an abnormally excessive supply of such commodity exists are necessary in order to maintain an orderly flow of wheat in interstate and foreign commerce under such conditions. (7 U. S. C. 1940 ed. 1331, February 16, 1938, 52 Stat. 52.)

Proclamations of Supplies and Allotments

SEC. 332. Not later than July 15 of each marketing year for wheat, the Secretary shall ascertain

and proclaim the total supply and the normal supply of wheat for such marketing year, and the national acreage allotment for the next crop of wheat. (7 U. S. C. 1940 ed. 1332, February 16, 1938, 52 Stat. 53.)

National Acreage Allotment

SEC. 333. The national acreage allotment for any crop of wheat shall be that acreage which the Secretary determines will, on the basis of the national average yield for wheat, produce an amount thereof adequate, together with the estimated carryover at the beginning of the marketing year for such crop, to make available a supply for such marketing year equal to a normal year's domestic consumption and exports plus 30 per centum thereof. The national acreage allotment for wheat for 1938 shall be sixty-two million five hundred thousand acres. *The national acreage allotment for wheat for any year shall be not less than fifty-five million acres.*[2] (7 U. S. C. 1940 ed. 1333, February 16, 1938, 52 Stat. 53.)

Apportionment of National Acreage Allotment

SEC. 334. (a) The national acreage allotment for wheat shall be apportioned by the Secretary among the several States on the basis of the acreage seeded for the production of wheat during the ten calendar years immediately preceding the calendar year in which the national acreage

[2] All of the italicized words except "any year" were added June 20, 1938, by 52 Stat. 775. The words "any year" were substituted July 26, 1939, by 53 Stat. 1125, in lieu of the figure "1939" (June 20, 1938, 52 Stat. 775).

allotment is determined (plus, in applicable years, the acreage diverted under previous agricultural adjustment and conservation programs), with adjustments for abnormal weather conditions and for trends in acreage during such period. (7 U. S. C. 1940 ed. 1334 (a), February 16, 1938, 52 Stat. 53.)

(b) The State acreage allotment for wheat shall be apportioned by the Secretary among the counties in the State, on the basis of the acreage seeded for the production of wheat during the ten calendar years immediately preceding the calendar year in which the national acreage allotment is determined (plus, in applicable years, the [1] acreage diverted under previous agricultural adjustment and conservation programs), with adjustments for abnormal weather conditions and trends in acreage during such period and for the promotion of soil-conservation practices. (7 U. S. C. 1940 ed. 1334 (b), February 16, 1938, 52 Stat. 54).

(c) The allotment to the county shall be apportioned by the Secretary, through the local committees, among the farms within the county on the basis of tillable acres, crop-rotation practices, type of soil, and topography. Not more than 3 per centum of such county allotment shall be apportioned to farms on which wheat has not been planted during any of the three marketing years immediately preceding the marketing year in which the allotment is made. (7 U. S. C. 1940 ed. 1334 (c), February 16, 1938, 52 Stat. 54.)

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[1] The word "net" formerly appearing at this point was deleted April 7, 1938, by 52 Stat. 203.

Marketing Quotas

[Public, No. 74, 77th Cong.] Notwithstanding the provisions of the Agricultural Adjustment Act of 1938, as amended (hereinafter referred to as the Act)—

(1) The farm marketing quota under the Act for any crop of wheat shall be the actual production of the acreage planted to wheat on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to wheat on the farm which is in excess of the farm acreage allotment for wheat. The farm marketing quota under the Act for any crop of corn shall be the actual production of the acreage planted to corn on the farm, less the normal production or the actual production, whichever is the smaller, of that acreage planted to corn on the farm which is in excess of the farm acreage allotment for corn.

The normal production, or the actual production, whichever is the smaller, of such excess acreage is hereinafter called the "farm marketing excess" of corn or wheat, as the case may be. For the purposes of this resolution, "actual production" of any number of acres of corn or wheat on a farm means the actual average yield of corn or wheat, as the case may be, for the farm times such number of acres.

(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of corn and wheat. The rate of the penalty shall be 50 per centum of the basic rate of the loan on the commodity for cooperators for such marketing

year under section 302 of the Act and this resolution.

(3) The farm marketing excess for corn and wheat shall be regarded as available for marketing, and the penalty and the storage amount or amounts to be delivered to the Secretary of the commodity shall be computed upon the normal production of the excess acreage. Where, upon the application of the producer for an adjustment of penalty or of storage, it is shown to the satisfaction of the Secretary that the actual production of the excess acreage is less than the normal production thereof, the difference between the amount of the penalty or storage as computed upon the basis of normal production and as computed upon the basis of actual production shall be returned to or allowed the producer. The Secretary shall issue regulations under which the farm marketing excess of the commodity for the farm may be stored or delivered to him. Upon failure to store or deliver to the Secretary the farm marketing excess within such time as may be determined under regulations prescribed by the Secretary, the penalty computed as aforesaid shall be paid by the producer. Any corn or wheat delivered to the Secretary hereunder shall become the property of the United States and shall be disposed of by the Secretary for relief purposes in the United States or in foreign countries or in such other manner as he shall determine will divert it from the normal channels of trade and commerce.

(4) Until the producers on any farm store, deliver to the Secretary, or pay penalty on, the farm

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marketing excess of any crop of corn or wheat, the entire crop of corn or wheat, as the case may be, produced on the farm shall be subject to a lien in favor of the United States for the amount of the penalty.

(5) The penalty upon corn or wheat stored shall be paid by the producer at the time, and to the extent, of any depletion in the amount of the commodity so stored, except depletion resulting from some cause beyond the control of the producer.

(6) Whenever the planted acreage of the then current crop of corn or wheat on any farm is less than the farm acreage allotment for such commodity, the total amount of the commodity from any previous crops required to be stored in order to postpone or avoid payment of penalty shall be reduced by that amount which is equal to the normal production of the number of acres by which the farm acreage allotment exceeds the planted acreage. The provisions of section 326 (b) and (c) of the Act shall be applicable also to wheat.

(7) A farm marketing quota on corn or wheat shall not be applicable to any farm on which the acreage planted to the commodity is not in excess of fifteen acres. The marketing penalty on corn or wheat shall not be applicable to any farm which, under the terms of the then current agricultural conservation program formulated under sections 7 to 17, inclusive, of the Soil Conservation and Domestic Allotment Act, is classified as a nonallotment farm if the acreage of the commodity harvested on such nonallotment farm is not in excess of fifteen acres or the acreage allotment for

the farm, whichever is larger. If the acreage of the commodity harvested on any such nonallotment farm is in excess of fifteen acres and in excess of such acreage allotment, the normal production or the actual production, whichever is the smaller, of the acreage harvested in excess of fifteen acres or such acreage allotment, whichever is larger, shall be taken as the farm marketing excess and shall be subject to penalty: *Provided,* That there shall be no penalty on wheat harvested on any such nonallotment farm from which no wheat is sold if the acreage of wheat harvested on such farm does not exceed such acreage per family living thereon as may be used for home consumption without reducing the payment with respect to the farm under the then current agricultural conservation program: *Provided further,* That for the marketing year beginning in 1941, there shall be no marketing penalty on wheat with respect to any such nonallotment farm if the acreage of wheat harvested on the farm is not in excess of the usual acreage determined for the farm under the 1941 agricultural conservation program and the county committee determines, in accordance with regulations of the Secretary, that there will not be marketed an amount of wheat in excess of the 1941 farm marketing quota.

(8) Until the farm marketing excess of corn or wheat, as the case may be, is stored or delivered to the Secretary or the penalty thereon is paid, each bushel of the commodity produced on the farm which is sold by the producer to any person within the United States shall be subject to the penalty as specified in paragraph (2) of this reso-

lution. Such penalty shall be paid by the buyer, who may deduct an amount equivalent to the penalty from the price paid to the producer.

(9) The marketing penalty for cotton and rice produced in the calendar year in which any marketing year begins (if beginning with or after the 1941–42 marketing year) shall be at a rate equal to 50 per centum of the basic rate of the loan for cooperators for such marketing year under section 302 of the Act and this resolution.

(10) The Commodity Credit Corporation is directed to make available upon the *1941, 1942, 1943, 1944, 1945 and 1946 crops of the commodities cotton, corn, wheat, rice, tobacco and peanuts*[4] for which producers have not disapproved marketing quotas *for the marketing year beginning in the calendar year in which such crop is harvested*,[5] loans as follows:

(a) To cooperators (except cooperators outside the commercial corn-producing area, in the case of corn) at the rate of 85 per centum of the parity price for the commodity as of the beginning of the marketing year;

(b) To cooperators outside the commercial corn-producing area, in the case of corn, at the rate of 75 per centum of the rate specified in (a) above;

(c) To noncooperators (except noncooperators outside the commercial corn-

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[4] Italicized matter substituted December 26, 1941, by — Stat. —, in lieu of the following: "1941 crop of the commodities cotton, corn, wheat, rice, or tobacco".

[5] Italicized matter substituted December 26, 1941, by — Stat. —, in lieu of the following: "for the marketing year beginning in 1941".

producing area, in the case of corn) at the rate of 60 per centum of the rate specified in (a) above and only on so much of the commodity as would be subject to penalty if marketed.

(11) The provisions of this resolution are amendatory of and supplementary to the Act, and all provisions of law applicable in respect of marketing quotas and loans under such Act as so amended and supplemented shall be applicable, but nothing in this resolution shall be construed to amend or repeal section 301 (b) (6), 323 (b), or 335 (d) of the Act.

(12) *Notwithstanding any of the foregoing provisions, the farm marketing excess for any crop of wheat for any farm shall not be larger than the amount by which the actual production of such crop of wheat on the farm exceeds the normal production of the farm wheat-acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary. Where a downward adjustment in the amount of the farm marketing excess is made pursuant to the provisions of this paragraph, the difference between the amount of the penalty or storage as computed upon the farm marketing excess before such adjustment and as computed upon the adjusted farm marketing excess shall be returned to or allowed the producer.** (May 26, 1941, 55 Stat. 203.)

SEC. 335. (a) Whenever it shall appear that the total supply of wheat as of the beginning of any marketing year will exceed a normal year's do-

* Italicized paragraph (12) added December 26, 1941, by — Stat. —, effective as of May 26, 1941.

mestic consumption and exports by more than 35 per centum, the Secretary shall, not later than the May 15 prior to the beginning of such marketing year, proclaim such fact and, during the marketing year beginning July 1 and continuing throughout such marketing year, a national marketing quota shall be in effect with respect to the marketing of wheat. The Secretary shall ascertain and specify in the proclamation the amount of the national marketing quota in terms of a total quantity of wheat and also in terms of a marketing percentage of the national acreage allotment for the current crop which he determines will, on the basis of the national average yield of wheat, produce the amount of the national marketing quota. Marketing quotas for any marketing year shall be in effect with respect to wheat harvested in the calendar year in which such marketing year begins notwithstanding that the wheat is marketed prior to the beginning of such marketing year. No marketing quota with respect to the marketing of wheat shall be in effect for the marketing year beginning July 1, 1938, unless prior to the date of the proclamation of the Secretary, provision has been made by law for the payment, in whole or in part, in 1938 of parity payments with respect to wheat. (7 U. S. C. 1940 ed. 1335 (a), February 16, 1938, 52 Stat. 54.)

(b) The amount of the national marketing quota for wheat shall be equal to a normal year's domestic consumption and exports plus 30 per centum thereof, less the sum of (1) the estimated carry-over of wheat as of the beginning of the marketing year with respect to which the quota

is proclaimed and (2) the estimated amount of wheat which will be used on farms as seed or livestock feed during the marketing year. (7 U. S. C. 1940 ed. 1335 (b), February 16, 1938, 52 Stat. 54.)

(c) *The farm marketing quota for any farm for any marketing year shall be a number of bushels of wheat equal to the sum of*[1]—

(1) *A number of bushels equal to the normal production or the actual production, whichever is the greater, of the farm acreage allotment; and*

(2) *A number of bushels equal to the amount, or part thereof, of wheat from any previous crop which the farmer has on hand which had such amount, or part thereof, been marketed during the preceding marketing year in addition to the wheat actually marketed during such preceding marketing year, could have been marketed without penalty.*

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[1] Italicized subsection (c) substituted July 26, 1939, by 53 Stat. 1126, in lieu of the following: "(c) The farm marketing quota for any farm for any marketing year shall be a number of bushels of wheat equal to the sum of—

"(1) A number of bushels equal to the normal production of a number of acres determined by applying the marketing percentage specified in the quota proclamation to the farm acreage allotment for the current crop; and

"(2) A number of bushels of wheat equal to the amount, or part thereof, of wheat from any previous crop which the farmer has on hand which, had such amount, or part thereof, been marketed during the preceding marketing year in addition to the wheat actually marketed during such preceding marketing year, could have been marketed without penalty.

"In no event shall the farm marketing quota for any farm be less than the normal production of half the farm acreage allotment for the farm." (February 16, 1938, 52 Stat. 54.)

(3) *Any farmer who does not market wheat in excess of the normal production or the actual production, whichever is the greater, of the farm acreage allotment shall not be subject to penalty under the provisions of section 339. Any farmer who stores, in accordance with regulations issued by the Secretary, an amount of wheat which is less than the amount subject to penalty, shall be presumed to have marketed the amount of such wheat subject to penalty which is not so stored.* (7 U. S. C. 1940 ed. 1335 (c).)

(d) No farm marketing quota with respect to wheat shall be applicable in any marketing year to any farm on which the normal production of the acreage planted to wheat of the current crop is less than *two hundred** bushels. (7 U. S. C. 1940 ed. 1335 (d). February 16, 1938, 52 Stat. 55.)

Referendum

SEC. 336. Between the date of the issuance of any proclamation of any national marketing quota for wheat and June 10, the Secretary shall conduct a referendum, by secret ballot, of farmers who will be subject to the quota specified therein to determine whether such farmers favor or oppose such quota. If more than one-third of the farmers voting in the referendum oppose such quota, the Secretary shall, prior to the effective date of such quota, by proclamation suspend the operation of the national marketing quotas with

* The italicized words "two hundred" were substituted June 6, 1940, by 54 Stat. 232, in lieu of the words "one hundred".

respect to wheat. (7 U. S. C. 1940 ed. 1336, February 16, 1938, 52 Stat. 55.)

Adjustment and Suspension of Quotas

SEC. 337. (a) If the total supply as proclaimed by the Secretary within forty-five days after the beginning of the marketing year is less than that specified in the proclamation by the Secretary under section 335 (a), then the national marketing quota specified in the proclamation under such section shall be increased accordingly. (7 U. S. C. 1940 ed. 1337 (a), February 16, 1938, 52 Stat. 55.)

(b) Whenever it shall appear from either the July or the August production estimates, officially published by the Division of Crop and Livestock Estimates of the Bureau of Agricultural Economics of the Department, that the total supply of wheat as of the beginning of the marketing year was less than a normal year's domestic consumption and exports plus 30 per centum thereof, the Secretary shall proclaim such fact prior to July 20, or August 20, as the case may be, if farm marketing quotas have been announced with respect to the crop grown in such calendar year. Thereupon such quotas shall become ineffective. (7 U. S. C. 1940 ed. 1337 (b), February 16, 1938, 52 Stat. 55.)

Transfer of Quotas

SEC. 338. Farm marketing quotas for wheat shall not be transferable, but, in accordance with regulations prescribed by the Secretary for such purpose, any farm marketing quota in excess of

the supply of wheat for such farm for any marketing year may be allocated to other farms on which the acreage allotment has not been exceeded. (7 U. S. C. 1940 ed. 1338, February 16, 1938, 52 Stat. 55,)

Penalties

SEC. 339. Any farmer who, while farm marketing quotas are in effect, markets wheat in excess of the farm marketing quota for the farm on which such wheat was produced, shall be subject to a penalty of 15 cents per bushel of the excess so marketed. (7 U. S. C. 1940 ed. 1339, February 16, 1938, 52 Stat. 55.)

SUBTITLE C—ADMINISTRATIVE PROVISIONS

PART I—PUBLICATION AND REVIEW OF QUOTAS

Application of Part

SEC. 361. This Part shall apply to the publication and review of farm marketing quotas established for tobacco, corn, wheat, cotton, [*] *peanuts,* [*] and rice, established under subtitle B." (7 U. S. C. 1940 ed. 1361, February 16, 1938, 52 Stat. 62.)

Publication and Notice of Quota

SEC. 362. All acreage allotments, and the farm marketing quotas established for farms in a county or other local administrative area shall, in accordance with regulations of the Secretary, be made and kept freely available for public inspection in such county or other local administrative area.

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[*] Matter from * to * added April 3, 1941, by 55 Stat. 88.

An additional copy of this information shall be kept available in the office of the county agricultural extension agent or with the chairman of the local committee. Notice of the farm marketing quota of his farm shall be mailed to the farmer. (7 U. S. C. 1940 ed. 1362, February 16, 1938, 52 Stat. 62.)

Review by Review Committee

SEC. 363. Any farmer who is dissatisfied with his farm marketing quota may, within fifteen days after mailing to him of notice as provided in section 362, have such quota reviewed by a local review committee composed of three farmers appointed by the Secretary. Such committee shall not include any member of the local committee which determined the farm acreage allotment, the normal yield, or the farm marketing quota for such farm. Unless application for review is made within such period, the original determination of the farm marketing quota shall be final. (7 U. S. C. 1940 ed. 1363, February 16, 1938, 52 Stat. 63.)

Review Committee

SEC. 364. The members of the review committee shall receive as compensation for their services the same per diem as that received by members of the committee utilized for the purposes of the Soil Conservation and Domestic Allotment Act, as amended. The members of the review committee shall not be entitled to receive compensation for more than thirty days in any one year. (7 U. S. C. 1940 ed. 1364, February 16, 1938, 52 Stat. 63.)

Institution of Proceedings

SEC. 365. If the farmer is dissatisfied with the determination of the review committee, he may, within fifteen days after a notice of such determination is mailed to him by registered mail, file a bill in equity against the review committee as defendant in the United States district court, or institute proceedings for review in any court of record of the State having general jurisdiction, sitting in the county or the district in which his farm is located, for the purpose of obtaining a review of such determination. Bond shall be given in an amount and with surety satisfactory to the court to secure the United States for the costs of the proceeding. The bill of complaint in such proceeding may be served by delivering a copy thereof to any one of the members of the review committee. Thereupon the review committee shall certify and file in the court a transcript of the record upon which the determination complained of was made, together with its findings of fact. (7 U. S. C. 1940 ed. 1365, February 16, 1938, 52 Stat. 63.)

Court Review

SEC. 366. The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for fail-

ure to adduce such evidence in the hearing before the review committee, the court may direct such additional evidence to be taken before the review committee in such manner and upon such terms and conditions as to the court may seem proper. The review committee may modify its findings of fact or its determination by reason of the additional evidence so taken, and it shall file with the court such modified findings or determination, which findings of fact shall be conclusive. At the earliest convenient time, the court, in term time or vacation, shall hear and determine the case upon the original record of the hearing before the review committee, and upon such record as supplemented if supplemented, by further hearing before the review committee pursuant to direction of the court. The court shall affirm the review committee's determination, or modified determination, if the court determines that the same is in accordance with law. If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires. (7 U. S. C. 1940 ed. 1366, February 16, 1928, 52 Stat. 63.)

Stay of Proceedings and Exclusive Jurisdiction

SEC. 367. The commencement of judicial proceedings under this Part shall not, unless specifically ordered by the court, operate as a stay of the

review committee's determination. Notwithstanding any other provision of law, the jurisdiction conferred by this Part to review the legal validity of a determination made by a review committee pursuant to this Part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this Part. (7 U. S. C. 1940 ed. 1367, February 16, 1938, 52 Stat. 64.)

No Effect on Any Other Quotas

SEC. 368. Notwithstanding any increase of any farm marketing quota for any farm as a result of review of the determination thereof under this Part, the marketing quotas for other farms shall not be affected. (7 U. S. C. 1940 ed. 1368, February 16, 1938, 52 Stat. 64.)

PART II—ADJUSTMENT OF QUOTAS AND ENFORCEMENT

* * * * *

Payment and Collections of Penalties

SEC. 372. (a) The penalty with respect to the marketing, by sale, of wheat, cotton, or rice, if the sale is to any person within the United States, shall be collected by the buyer. (7 U. S. C. 1940 ed. 1372 (a), February 16, 1938, 52 Stat. 65.)

(b) All penalties provided for in Subtitle B shall be collected and paid in such manner, at such times, and under such conditions as the Secretary may by regulations prescribe. Such penalties shall be remitted to the Secretary by the person liable for the penalty, except that if any other

person is liable for the collection of the penalty, such other person shall remit the penalty. The amount of such penalties shall be covered into the general fund of the Treasury of the United States. (7 U. S. C. 1940 ed. 1372 (b), February 16, 1938, 52 Stat. 65.)

(c)[10] *Whenever, pursuant to a claim filed with the Secretary* [a] *within two years* [a] *after payment to him of any penalty collected from any person pursuant to this Act,*[11] *the Secretary finds that such penalty was erroneously, illegally, or wrongfully collected* [b] *and the claimant bore the burden of the payment of such penalty,* [b] *the Secretary shall certify to the Secretary of the Treasury for payment to the claimant, in accordance with regulations prescribed by the Secretary of the Treasury, such amount as the Secretary finds the claimant is entitled to receive as a refund of such penalty.*[12]

[c] *Notwithstanding any other provision of law, the Secretary is authorized to prescribe by regulations for the identification of farms and it shall be sufficient to schedule receipts into special deposit accounts or to schedule such receipts for transfer therefrom, or directly, into the separate fund provided for in subsection (b) hereof by means of such identification without reference to the names of the producers on such farms.* [c]

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[10] Italicized subsection (c) added April 7, 1938, by 52 Stat. 204.

[11] Matter from [a] to [a] substituted July 2, 1940, by 54 Stat. 728, in lieu of the following: "within one year".

[12] Matter from [b] to [b] and matter from [c] to [c] added July 2, 1940, by 54 Stat. 728.

The Secretary is authorized to prescribe regulations governing the filing of such claims and the determination of such refunds. (7 U. S. C. 1940 ed. 1372 (c).)

(d) *No penalty shall be collected under this Act with respect to the marketing of any agricultural commodity grown for experimental purposes only by any publicly owned agricultural experiment station.*[15] (7 U. S. C. 1940 ed. 1372 (d).)

SUBTITLE D—MISCELLANEOUS PROVISIONS AND APPROPRIATIONS

PART I—MISCELLANEOUS

Utilization of Local Agencies

SEC. 388. (a) The provisions of section 8 (b) and section 11 of the Soil Conservation and Domestic Allotment Act, as amended, relating to the utilization of State, county, local commitees, the extension service, and other approved agencies, and to recognition and encouragement of cooperative associations, shall apply in the administration of this Act; and the Secretary shall, for such purposes, utilize the same local, county, and State committees as are utilized under sections 7 to 17, inclusive, of the Soil Conservation and Domestic Allotment Act, as amended. The local administrative areas designated under section 8 (b) of the Soil Conservation and Domestic Allotment Act, as amended, for the administration of programs under that Act, and the local administrative areas

[15] Italicized subsection (d) added April 7, 1939, by 52 Stat. 204.

designated for the administration of this Act shall be the same. (7 U. S. C. 1940 ed. 1388 (a), February 16, 1938, 52 Stat. 68.)

* * * * *

Separability

SEC. 390. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons or circumstances, and the provisions of the Soil Conservation and Domestic Allotment Act, as amended, shall not be affected thereby. Without limiting the generality of the foregoing, if any provision of this Act should be held not to be within the power of the Congress to regulate interstate and foreign commerce, such provision shall not be held invalid if it is within the power of the Congress to provide for the general welfare or any other power of the Congress. If any provision of this Act for marketing quotas with respect to any commodity should be held invalid, no provision of this Act for marketing quotas with respect to any other commodity shall be affected thereby. If the application of any provision for a referendum should be held invalid, the application of other provisions shall not be affected thereby. If by reason of any provision for a referendum the application of any such other provision to any person or circumstance is held invalid, the application of such other provision to other persons or circumstances shall not be affected thereby. (7 U. S. C. 1940 ed. 1390, February 16, 1938, 52 Stat. 69.)

In the District Court of the United States for the Southern District of Ohio, Western Division

(At Dayton)

CIVIL No. 118

ROSCOE C. FILBURN, R. R. #10, DAYTON, OHIO,
PLAINTIFF

v.

CARL R. HELKE, R. R. #1, VANDALIA, OHIO,
ROY M. BAKER, R. R. #1, SPRING VALLEY, OHIO,
AND
HOMER W. FLINSBACH, R. R. #1, GERMANTOWN, OHIO,
INDIVIDUALLY AND AS MEMBERS OF THE COUNTY COMMITTEE IN AND FOR MONTGOMERY COUNTY, OHIO, UNDER THE AGRICULTURAL ADJUSTMENT ACT OF 1938, AS AMENDED,
DALE WILLIAMS, HOLLANSBURG, DARKE COUNTY, OHIO, INDIVIDUALLY AND AS STATE CHAIRMAN FOR THE STATE OF OHIO UNDER THE AGRICULTURAL ADJUSTMENT ACT OF 1938, AS AMENDED, AND
CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, 2101 NEW HAMESHIRE AVENUE, WASHINGTON, D. C.,
DEFENDANTS

Before ALLEN, *Circuit Judge*, and NEVIN and DRUFFEL, *District Judges*

DRUFFEL, *District Judge:* The above entitled action was submitted to this three judge court organized under Section 3 of the Act of August 24, 1937, after argument, upon the pleadings and agreed stipulation of facts from which it appears that plaintiff is a farmer who has been engaged in producing wheat among other products on a farm in Montgomery County, Ohio. Under the provisions of the Agricultural Adjustment Act of 1938 as amended, a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels an acre were established for plaintiff's farm in July 1940, for the 1941 wheat crop.

In the fall of 1940 plaintiff planted 23 acres of wheat which produced in July 1941, 462 bushels, which amounted to 239 bushels farm marketing excess over the fixed allotment. At the time of planting the acreage in excess of the allotment, Section 339 of the Act provided:

> Any farmer who, while farm marketing quotas are in effect, markets wheat in excess of the farm marketing quota for the farm on which such wheat was produced, shall be subject to a penalty of 15 cents per bushel of the excess so marketed.

In due time, the defendant Claude R. Wickard, Secretary of Agriculture, pursuant to the Act, issued a proclamation relating to the national marketing quota, at the same time calling for a national referendum on May 31, 1941, of wheat farmers planting more than fifteen acres of wheat (fifteen acres or less are exempt from the Act) to approve or disapprove of the quota allotment, etc., and also issued instructions as to the referendum.

On May 19, 1941, Mr. Wickard, made a radio address to the farmers of the United States, in which he strongly urged an affirmative vote of more than the necessary two-thirds of eligible wheat farmers in the national referendum, saying among other things:

> * * * To make wise decisions, we need to know the facts. What then, in view of the vote on May 31, are some of the facts about wheat? For one thing, we have a record amount of old wheat on hand and a bumper crop in prospect. That is something to be looked at with satisfaction on one hand, and with alarm on the other. * * *
>
> Because of the uncertain world situation, we deliberately planted several million extra acres of wheat this year. * * * Farmers should not be penalized because they have provided insurance against shortages of food. The nation wants farmers safeguarded against unfair penalties. The nation also wants other protection given agriculture.
>
> * * * As you all know, parity is one of the most important objectives of the national farm programs and will continue to be a goal. * * *
>
> Only last week, the Senate and House sent to the White House a bill calling for an 85 percent of parity loan for wheat. * * *
>
> But no wheat loan will be made unless wheat farmers vote for marketing quotas and without the loan there is no hope for parity on wheat in 1941. So parity for wheat is up to the wheat farmers themselves. * * *
>
> The law provides that wheat loans will not be made if wheat growers vote down

marketing quotas. * * * The continuance—or discontinuance—of government loans on wheat is at stake in this referendum on May 31. To put it bluntly, no quotas, no loans. And, judging from prices in Canada, rejection of marketing quotas on May 31 would just about cut the price of wheat in this country in half. * * *

I wish that corn and wheat farmers were able to vote on marketing quotas before they plant their crops, instead of afterwards as is the case now. Cotton, tobacco and rice farmers vote on quotas before they plant and I see no good reason for denying this privilege to wheat and corn growers. I am sorry that the legislation authorizing loans at 85 percent of parity did not change the time for voting on wheat and corn quotas. This provision was recommended by the Department of Agriculture and we plan to recommend it to Congress again. Yet the fact that the referendum on wheat quotas comes after the crop is almost ready for harvest in no way alters the significance of the vote. * * *

In the national referendum 81% voted in favor of the marketing quotas and 19% were opposed to the quotas.

On May 26, 1941, the bill referred to by Mr. Wickard, relating to wheat marketing quotas under the Act of 1938, as amended, was approved. The Act as thus amended provided for an increase in loans on wheat equal to 85% of the parity price of wheat. It also provided during any marketing year the quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess at the rate of one-half of the basic rate

of the loan on the commodity, and that the entire crop of wheat produced on the farm shall be subject to a lien in favor of the United States for the amount of the penalty.

Plaintiff for his cause of action complains that the excess of 239 bushels of wheat has been subjected to a penalty of 49 cents per bushel by the defendant county committee; that his entire crop of wheat is subject to a lien for the payment thereof, and unless paid he would be refused a marketing card, which is necessary for plaintiff to sell his crop of wheat.

By reason thereof plaintiff challenges the authority of the Secretary of Agriculture to construe said Act, as amended, retroactively as to the crop of wheat planted in the fall of 1940, and asserts that the referendum is invalid and the Act and amendments thereto are violative of Sections 4 and 9 of Article I of the Constitution and of the Fifth and Tenth Amendments thereto.

In the recent case of *Mulford et al.* v. *Smith et al.*, 307 U. S. 38, the Supreme Court considered questions relating to the claimed retroactive operation of the Tobacco Act, and upheld the Act.

Upon analysis we believe the case at bar is clearly distinguishable from *Mulford et al.* v. *Smith et al.*, aside from the difference in controlling provisions of the Wheat and Tobacco Acts, and should be placed in an entirely different category because of the circumstances surrounding the referendum and the fact that the law increasing the penalty was approved only five days prior to the national referendum held in forty wheat growing states.

Considering the fact that the law increasing the penalty to one-half of the 85% parity loan and subjecting the entire wheat crop to a lien for the payment thereof became effective May 26, 1941, yet would be inoperative if more than one-third of the eligible wheat farmers opposed the quota in the May 31st referendum, it becomes important to determine whether or not the necessary two-thirds of the wheat farmers voluntarily voted affirmatively or were unintentionally misled in so voting in the referendum.

It is fully recognized by all that Congress has devoted much time in the past several years in a laudable effort to help the farmers, and as Mr. Wickard said: "parity is one of the most important objectives of the national farm programs and will continue to be a goal," and it is but natural that the several hundred thousands of wheat farmers, scattered all over the United States (559,630 voted), should look to the Secretary of Agriculture for advice and direction in a matter of such importance as the quota referendum, and when in his official capacity, the Secretary, in the nation-wide radio speech appealing for an affirmative vote for the quota, eleven days prior to the referendum, said:

> * * * To make wise decisions, we need to know the facts.
>
> * * * Because of the uncertain world situation, we deliberately planted several million extra acres of wheat. * * * Farmers should not be penalized because they have provided insurance against shortages of food.

it would seem that the Secretary meant what he said and that the farmers voting affirmatively would not be penalized for the "deliberately planted" excess acreage beyond the law in effect at the time of planting. But the contrary was true, the bill to which Mr. Wickard referred greatly increased the penalty for the "deliberately planted" excess acreage and subjected the entire crop to a lien for the payment of the penalty.

Giving full credit to the Secretary for his zeal and his efforts to help the farmer to avoid ruinous wheat prices which he foresaw if the quota referendum failed, yet it would seem that the equities of the situation demanded that the Secretary also forewarn the farmers that in accepting the benefits of increased parity loans they were also subjecting themselves to increased penalties for the farm marketing excess.

In the *Mulford et al.* v. *Smith et al. case*, 307 U. S. 38, 46 and 47, the court say:

> In the light of the fact that the appellants received notice of their quotas only a few days before the actual marketing season opened, the maintenance of actions based upon collection of the penalties would have been a practical impossibility. We are of opinion, therefore, that a case is stated for the interposition of a court of equity.

Here but five days intervened between the time the law became effective and the favorable referendum which made it operable.

We have no precedent in point to guide us in a determination of the precise issues raised by the

foregoing state of facts. However, in cases involving the validity of gift taxes, a principle was approved which we think applicable here. The Supreme Court in *Nichols* v. *Coolidge*, 274 U. S. 531, 542, say:

> This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment.

and in *Welch* v. *Henry*, 305 U. S. 134, 147, say:

> In the cases in which this court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. (The voluntary act in the case at bar being the affirmative vote in the referendum.)

Under the circumstances we are obliged to hold that the amendment of May 26, 1941, in so far as it increased the penalty for the farm marketing excess over the fifteen cents per bushel prevailing at the time of planting and subjected the entire crop to a lien for the payment thereof, operated retroactively and that it amounts to a taking of plaintiff's property without due process, and also, or in the alternative that the equities of the case as shown by the record favor the plaintiff.

In consideration whereof the court grants plaintiff's prayer to the extent that defendants be perpetually enjoined from collecting the penalty for the farm marketing excess over and above

fifteen cents per bushel and from subjecting the entire crop to a lien for the payment thereof and from collecting said fifteen cents per bushel except in accordance with the provisions of Section 339 of the Agricultural Adjustment Act of 1938 as it was in effect prior to May 26, 1941.

In view of the foregoing we deem it unnecessary to pass on the other questions raised by plaintiff's bill of complaint. *Brucker* v. *Fisher*, 49 F. (2d) 759–761 (C. C. A. 6); *Piedmont & N. Ry. Co.* v. *Query*, 56 F. (2d) 172–175.

NEVIN, *District Judge*, concurs.

(Signed) DRUFFEL—*J.*
NEVIN—*J.*

ALLEN, *Circuit Judge*, dissenting: I cannot agree with the conclusions of my colleagues. There is no equitable justification for interference by this court with the fulfillment of the declared legislative will of the nation because of the circumstances under which a marketing excess of wheat was established for plaintiff's farm.

The question of the legal effect of alleged infirmities in the referendum on quota provisions for the 1941 crop of wheat is substantially identical in every material respect with that considered by the Supreme Court in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533. That case held that an order issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act was valid and enforceable. The order fixed minimum prices to be paid producers for milk sold to dealers and disposed of by them in a designated market area comprising

the city of New York and adjacent counties. Just as here, a favorable referendum of farmers was made a condition upon the operation and effectiveness of wheat marketing quotas, so in that case the Marketing Agreement Act required that an order fixing prices to the producers should be made only on condition that such provision was "approved or favored" by a specific proportion of the producers of the milk covered in such order. Title 7, U. S. C., § 608c (9) (B). There a pamphlet issued by the Department of Agriculture prior to the referendum and publications of private organizations to the effect that dealers would be required to pay all producers the uniform price established, whereas the order made it clear that the uniform price was not applicable to milk sold outside the market area or to milk handled by cooperatives. The Supreme Court held that the validity of the referendum had not been affected.

Here the alleged misrepresentation claimed to have vitiated the submission of the wheat quota referendum is extracted from a radio speech of the Secretary of Agriculture made some twelve days before the referendum. He said that "farmers should not be penalized because they have provided insurance against shortages of food." The plaintiff claims this language is misleading because of the provision in the amendment to the Act which increased the penalty on the farm marketing excess from 15 to 49 cents per bushel. The context of the Secretary's speech makes it clear that he was speaking of penalties in the form of ruinously low prices which result from an excess supply of any basic farm commodity. No

reference to enforcement provisions of any legislation, new or old, could reasonably be understood to be intended from the reference to low prices as penalties, for the Secretary went on to say:

> The nation also wants other protection given agriculture. One expression of this wish is the national farm programs. These programs protect all farmers. Since the second world war began, commodity loans have stood between wheat producers and the economic blitzkrieg.
>
> Without the programs, wheat prices would be threatening the low record of 1932 instead of being within striking distance of parity as they are now.

Other statements significant of the intended emphasis are as follows:

> Average prices of wheat to Kansas growers in mid-May were about 80 cents. This compares with about 45 cents to Canadian farmers (United States money). Leaving out government payments, American producers will receive over twice as much for this year's wheat as Canadian growers.
>
> High prices without adjustment of supply are certain to be followed by ruinously low prices. We know that from experience.

It is not claimed that the speech was intended to mislead producers, and considered as a whole, it would not have a natural tendency to mislead. As in *United States* v. *Rock Royal Co-operative, Inc., supra,* "there is no evidence that any producer misunderstood." The Secretary declared as a fact and it is not denied that the requisite

proportion of the participants voted in favor of the institution of quotas. In the language of the Supreme Court; "There is no authority in the courts to go behind this conclusion of the Secretary to inquire into the influences which caused the producers to favor" the proposed action. *United States* v. *Rock Royal Co-operative, Inc., supra.*

While the plaintiff presents a case of possible hardship, I do not think that the penalty provisions operate so retroactively or so arbitrarily as to violate the Fifth Amendment.

In *Mulford* v. *Smith,* 307 U. S. 38, the crop of tobacco, which was subjected to a penalty insofar as it exceeded certain quotas and was marketed, had been planted in seed beds before the Act was passed, had matured and was ready for marketing before producers received notice of the quota allotted to their respective farms. In that case it was claimed that since the producers complaining were unable to process their tobacco and make it fit to be held for sale in a later year, the penalty amounted to a tax upon production and was so oppressive as to be invalid. The Supreme Court held that the fact that certain producers had not provided facilities for processing and storing the excess tobacco was of no legal significance.

The distinctions which the plaintiff advances do not distinguish the Mulford case. The plaintiff complains that his entire crop of wheat is now subject to a lien in favor of the United States for the amount of the penalty. The assertion is made that "Wheat farmers, under the provisions of the Act as amended on May 26, 1941, are denied

the privilege of storing their wheat, any part of it, without paying the penalty of 49 cents a bushel on all of the excess production." This statement is misleading. It is true only if storing is given the meaning of "storing without compliance with the Act," for the resolution adopted May 26, 1941 (Public Law 74–77th Congress) expressly provides (paragraph 4):

> Until the producers on any farm *store,* deliver to the Secretary, or pay the penalty on, the farm marketing excess of any crop of corn or wheat, the entire crop of corn or wheat, as the case may be, produced on the farm shall be subject to a lien in favor of the United States for the amount of the penalty. [Italics added.]

This clearly means that the lien and the penalty may be avoided by storage of the excess. This conclusion is reenforced by paragraph 6 of the same amendment, which reads:

> Whenever the planted acreage of the then current crop of corn or wheat on any farm is less than the farm acreage allotment for such commodity, the total amount of the commodity from any previous crops required to be stored in order to postpone or avoid payment of penalty shall be reduced by that amount which is equal to the normal production of the number of acres by which the farm acreage allotment exceeds the planted acreage. The provisions of section 326 (b) and (c) of the Act shall be applicable also to wheat.

Penalties, therefore, may be avoided by planting acreage below the allotment for a later year or by yields in a subsequent year which are below normal either for the particular farm or for the nation as a whole. Title 7, U. S. C., Section 1326 (b) and (c).

The Act does not purport to control production, but only sale or use. It had been passed some two and a half years before the plaintiff's crop was planted, and it is stipulated that plaintiff had notice of his farm acreage allotment in July, 1940, before the planting of his 1941 crop of wheat. An exaction is not necessarily unconstitutional because retroactive. *Milliken* v. *United States*, 283 U. S. 15, 21. "In each case, it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Welch* v. *Henry*, 305 U. S. 134, 147. It is not so harsh or oppressive here. While the monetary value of plaintiff's wheat crop has been so increased by the stimulating affect of the Act upon wheat prices that increased price more than compensates for any penalty that plaintiff may be required to pay, it is even more significant that plaintiff had been warned by the fact that Congress had undertaken to regulate the supply of wheat available for market by the imposition of penalties. *Milliken* v. *United States, supra.* The Act had been amended in material respects before plaintiff planted his wheat in the fall of 1940, and he could reasonably anticipate that Congress would make further amendments if they

were deemed advisable. One amendment previously made showed that Congress intended to make whatever changes were appropriate to avoid circumvention of the basic purposes of the Act, for it had expanded the meaning of "market" so as to include in the case of wheat, feeding to poultry or livestock. 54 Stat. 727, Sec. 3, approved July 2, 1940.

Congress may impose penalties in aid of the exercise of any of its granted powers. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 393. The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over matters within their jurisdiction. *United States* v. *Rock Royal Co-operative, Inc., supra*, at 569, 570. If the commerce clause is a sufficient source of power, controls adopted in its exercise are unconstitutional "only if arbitrary, discriminating or demonstrably irrelevant to the policy the legislature is free to adopt and hence an unnecessary and unwarranted interference with individual liberty." *Nebbia* v. *New York*, 291 U. S. 502, 539. Here the classification of wheat subject to penalty and wheat free from penalty is an "integral and essential feature" of the Act. Adequate administrative procedure with court review has been provided to insure fair allocation of quotas. Cf. *R. R. Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 311 U. S. 614; *ibid.*, 311 U. S. 570. Discrimination between cooperating and non-cooperating producers is a constitutional means of securing compliance. "* * * the Fifth Amendment, unlike the Fourteenth, has no equal protection clause."

Sunshine Anthracite Coal Co. v. *Adkins, supra,* at 401.

The Act as applied to wheat is a valid exercise of the federal commerce power. The tobacco marketing quota provisions have been so upheld. *Mulford* v. *Smith, supra.* A like decision has been reached as to the provisions relating to cotton. *Troppy* v. *LaSara Farmers Gin Co., Inc.,* 113 Fed. (2d) 350 (C. C. A. 5). Denial of the same validity to wheat regulation, as a regulation of interstate and foreign commerce, as has been accorded to the tobacco and cotton regulations of the Act, would result in an incongruous exercise of the federal commerce power.

It is no longer open to question that Congress has the power to protect interstate commerce "from interference or injury due to activities which are wholly intrastate." *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601. "Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them." *United States* v. *Rock Royal Co-operative, Inc., supra,* at 569.

It is true that Congress has no power to regulate intrastate transactions which affect commerce only indirectly. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495. But where it is claimed that the local activity sought to be regulated does not directly affect commerce, decision should not be made by examination of the effect of isolated individual activity, but must include due regard to the total effect of the attempted regulation. *United States* v. *Darby,* 312 U. S. 100, 123.

Title 7, U. S. C., Section 1331, reads as follows:

> Wheat is a basic source of food for the Nation, is produced throughout the United States by more than a million farmers, is sold on the countrywide market, and, as wheat or flour, flows almost entirely through instrumentalities of interstate and foreign commerce from producers to consumers.
>
> Abnormally excessive and abnormally deficient supplies of wheat on the countrywide market acutely and directly affect, burden, and obstruct interstate and foreign commerce. Abnormally excessive supplies overtax the facilities of interstate and foreign transportation, congest terminal markets and milling centers in the flow of wheat from producers to consumers, depress the price of wheat in interstate and foreign commerce, and otherwise disrupt the orderly marketing of such commodity in such commerce. Abnormally deficient supplies result in an inadequate flow of wheat and its products in interstate and foreign commerce with consequent injurious effects to the instrumentalities of such commerce and with excessive increases in the prices of wheat and its products in interstate and foreign commerce.
>
> * * * * *
>
> The conditions affecting the production and marketing of wheat are such that, without Federal assistance, farmers, individually or in cooperation, cannot effectively prevent the recurrence of such surpluses and shortages and the burdens on interstate and foreign commerce resulting therefrom, maintain normal supplies of wheat, or provide for the orderly marketing thereof in interstate and foreign commerce.

> * * * The provisions hereof for regulation of marketings by producers of wheat whenever an abnormally excessive supply of such commodity exists ar necessary in order to maintain an orderly flow of wheat in interstate and foreign commerce under such conditions.

The stipulation of facts now before us amply supports these legislative findings. It follows that the power to regulate the supply of wheat that normally moves in interstate or foreign commerce must be upheld as appropriate means reasonably adapted to the regulation of interstate commerce. Since regulation of the supply of wheat available for sale in interstate commerce but actually used within the state of its origin is drawn into a general plan for the protection of interstate commerce in the commodity from the interferences, burdens and obstructions arising from excessive surplus and the social evils of low values, the power of Congress extends to it as well. *United States* v. *Rock Royal Co-operative, Inc., supra,* at 569. The regulation of prices there upheld had no more direct or substantial relation to the flow of goods in interstate commerce than does control of supply. The local activities regulated not only affect interstate commerce but also affect the exercise of the granted power of Congress to regulate interstate commerce in sufficient measure so that such regulation is an appropriate and hence permissible means of attaining that legitimate end. See *United States* v. *Darby, supra,* at 118.

The bill of complaint should be dismissed.

(Signed) ALLEN,
Circuit Judge.

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